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No. 1038

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1946

POTOMAC ELECTRIC POWER COMPANY, *Petitioner*,

v.

PUBLIC UTILITIES COMMISSION OF THE DISTRICT OF COLUMBIA, ET AL., *Respondents*.

Brief of Respondent, Public Utilities Commission, in Opposition to Petition for Writ of Certiorari

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DIVISION OF PRINTING AND PUBLICATIONS—GOVERNMENT OF THE DISTRICT OF COLUMBIA

INDEX

Page

SUBJECT INDEX

Appendix 20
Counter Statement 1
Summary of Argument 7
Argument 8
1. *Paragraph 18 of the Act Authorizes the Commission to Alter or Amend Orders Authorized by the Paragraph* 8
2. *Paragraph 6 of the Act Does Not Establish A Formula For Determining A Rate Base* 12
3. *The Questions Presented Are Not Such As To Justify Review* ... 18
Conclusion 19

STATUTORY REFERENCES

Act Creating The Public Utilities Commission (37 Stat. 974, Section 43-101 to 1007, inclusive, D. C. Code) 3
Paragraph 2 3
Paragraph 6 7
Paragraph 7 15
Paragraph 18 3
Paragraph 64 15

CASES CITED

Federal Power Commission v. *Hope Natural Gas Co.*, 320 U. S. 591 17
Federal Power Commission v. *Natural Gas Pipe Line Co.*, 315 U. S. 575 .. 17
Potomac Electric Power Co. v. *Public Utilities Commission*, Equity No. 53475 4
Potomac Electric Power Co. v. *Public Utilities Commission*, 51 App. D. C. 77, 276 Fed. 327 16
Public Utilities Commission v. *Capital Traction Company*, 57 App. D. C. 85, 17 F. (2d) 673 16
Smyth v. *Ames*, 169 U. S. 466 13
Vinson v. *Washington Gas Light Company*, 321 U. S. 489 11

OTHER REFERENCES

Natural Gas Act (52 Stat. 821, 15 U. S. C. 717) 17
Senate Report No. 300, 62nd Congress, Second Session 14

INDEX

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COUNTER STATEMENT

On April 26, 1943, the Public Utilities Commission of the District of Columbia (hereinafter referred to as "Commission") issued an order of investigation to determine:

"1. Whether the sliding-scale method of electric rate regulation shall be abandoned.

2. Whether the sliding-scale method of electric rate regulation shall be continued in its present form or with modifications of the basic elements of the existing arrangement:
   (a) The rate base.
   (b) Rate of return.
   (c) Depreciation accruals.
   (d) Method of effecting rate reductions." (R. 1.)

On January 5, 1944, the Commission promulgated the usual order for annual investigation of rates under the provisions of the sliding-scale arrangement and on January 26, 1944, issued its Notice of Hearing in which it stated that the matters set forth in the orders of April 26, 1943, and January 5, 1944, would be consolidated for hearing. Pursuant to the said orders and the notice, formal public hearings were held on 33 days in the period from February 28, 1944, to May 9, 1944, inclusive. (R. 1-2.)

At no time did Petitioner contest the right of the Commission to investigate the provisions of the sliding-scale plan for the purpose of determining whether modification thereof should be made. The Petitioner participated fully throughout the hearing by cross-examination of witnesses and by offering evidence in its behalf. It offered testimony on various phases of the investigation. On the subject of the rate base, the Petitioner presented the testimony of the Vice-President of Stone & Webster Engineering Corporation, who presented a study of projected historical cost trends, which the witness contended was the present fair value of the property in the amount of $117,396,000. The witness did not contend that this fair value should be substituted for the existing rate base, nor did the Petitioner contend for such a valuation. (R. 17.)

When the Petitioner appealed from the judgment of the District Court, affirming the Commission's order, it did not

designate any of its testimony nor any part of the record dealing with factual determinations. It relied, in the court below, on the simple law questions relating to the powers of the Commission and contended that the Commission had no authority to modify the sliding-scale arrangement without the Petitioner's consent. (R. 267.) Therefore, the questions of the rate base, the amount of depreciation reserve or annual charges for depreciation, and the rate of return were not before the court below.

In the proceedings before the Commission, the Petitioner took the position that the sliding-scale arrangement, as then constituted, was fair to both consumers and to it and that it should not be changed. It indicated that if any of its provisions were modified "in such a way as to make the plan unacceptable" to it, then it "may withdraw from the plan." This position was not because of lack of power in the Commission to modify, but because the plan would no longer be a "mutual agreement." (R. 10.)

The Commission's order was promulgated July 22, 1944. The Petitioner waited until it filed its application for reconsideration on August 11, 1944, and for the first time stated that it rejected the sliding-scale arrangement as modified by the Commission under its order No. 2796. (R. 246.)

The Petitioner refers to the sliding-scale arrangement authorized by paragraph 18 of the act (37 Stat. 974, 980; Section 43-317, D. C. Code) as a compromise method of rate regulation. Paragraph 18 of the act does not authorize the Commission to compromise rate regulation. It specifically declares that no such arrangement shall be lawful until it shall be found by the Commission "to be reasonable and just and not inconsistent with the purposes" of the act. Paragraph 2 of the act (37 Stat. 977, Section 43-301, D. C. Code) prohibits every "unjust or unreasonable or discriminatory charge" for public utility service. That paragraph lays down the standard by which the Commission must be guided in all of its rate regulation. If any plan adopted under the au-

thority of paragraph 18 permitted charges that are unjust, unreasonable, or discriminatory, it would be inconsistent with the purpose of the act. It is obvious from the foregoing that no rate-making plan under paragraph 18 or any other provision of the act may be designated as a "compromise method" of rate-making. Congress did not designate the plan authorized by paragraph 18 as a compromise method.

On page 3 of its petition, the Petitioner stated that the arrangement entered into in 1924 remained in effect until 1943 with occasional changes in its component terms by "mutual agreement." Record page 7 shows that the plan was modified in 1931 by reducing the basic rate of return from 7½% to 7%. That modification was not made by "mutual agreement." In *Potomac Electric Power Co.* v. *Public Utilities Commission*, Equity No. 53475, (In the Supreme Court of the District of Columbia, now the United States District Court for the District of Columbia) the Petitioner brought suit to enjoin the Commission from reducing the basic rate of return on the same ground set forth in the first question presented in this petition. It contended in that court as it does here, that the Commission had no authority to modify the sliding-scale plan without the Petitioner's consent. In that case the court held that the Commission had jurisdiction "to alter or amend the existing sliding-scale arrangement." Notice of appeal to the United States Court of Appeals for the District of Columbia was noted but the appeal was not prosecuted.

The Commission again modified the plan in 1935 to reduce the basic rate of return to 6½% and in 1937 to 6%.

On page 3 of the petition it is stated that the sliding-scale plan provides for annual reduction of rates by half the excess of net income over an approved rate of return on "an agreed rate base." The plan itself set forth the method by which the rate base should be determined but the rate base determined by the Commission is not an agreed rate base, and, in fact, has ben challenged in minor particulars in nearly

every proceeding under the plan. The Petitioner further states that the remaining half of any excess net income "remains" with the Petitioner as an incentive to further investment and efficiency of service. This is half the fact. Under the plan no part of the excess income above the basic rate of return is ever refunded by the Petitioner. It retains the entire amount of the excess, but one-half of that amount is used as a measure to reduce rates in the following year.

On page 4 of its petition, the Petitioner said that in the investigation the Commission "made no effort at a new valuation," and on page 7 said that the Commission did not purport to make any finding of value or to use the concept of value as a step in its reasoning "but indeed expressly repudiated value as a guide." These statements are contrary to fact. On pages 18 to 22, inclusive, of the Record, the Commission sets forth its findings as to a rate base, including material and supplies. On Record page 19 the Commission said a rate base predicated upon original costs is fair to the utility, its investors and consumers because it gives recognition to every dollar actually invested in the property. The Commission then found that the electric plant component of the rate base shall be the original cost of property used and useful in public service at December 31, 1943. On page 21 of the Record, the Commission set forth the gross rate base both weighted and unweighted including materials and supplies. On page 22 of the Record, the Commission found that a depreciated rate base should be employed as one of the factors in the sliding-scale arrangement in the determination of rate adjustment for the year 1944 and thereafter.

On pages 22 to 26, inclusive, of the Record, the Commission discussed the testimony relating to the depreciation reserve and on page 26 made its finding of the depreciation reserve which it found constituted a fair and reasonable determination of the accrued depreciation for application in establishing a depreciated rate base under the modified sliding-scale plan. On page 42 of the Record, the Commission

shows its justification for reduction in rates and how the amount was determined. It there shows the rate base as determined from its findings hereinabove discussed, and set forth in footnote 6 thereon its determination of the rate base and the elements thereof.

On page 4 of its petition, the Petitioner states that the Commission professed to exercise a power to modify the sliding-scale arrangement without compliance with regular rate-making requirements, but it does not state what rate-making requirements the Commission did not satisfy. The Commission's Findings and Opinion (R. 1 to 44, inclusive) refute the assertions made by the Petitioner.

On page 4 of the petition it is asserted that the Commission reduced rates as a result of lopping off $25,000,000 from the $106,000,000 rate base. This statement is contrary to fact as shown by the Commission's findings. The Commission has never established a rate base of $106,000,000. The rate base established by the Commission for the year 1942 was approximately $100,000,000. This was an undepreciated rate base. The sliding-scale arrangement prior to its modification by Order No. 2796 also provided that the accrual for depreciation should be lessened by interest on the reserve balance calculated at the rate of 4% per annum to compensate, in part at least, for the use of an undepreciated rate base. (R. 4.) The Commission did modify the sliding-scale arrangement to provide for the use of a depreciated rather than an undepreciated rate base. (R. 22.) It also allowed as an operating revenue deduction the full amount of the depreciation accrual. (R. 26.) The net effect of this change on the return to the Company is something less than $300,000. The Petitioner's statement would lead the Court to believe that its return was reduced by $1,375,000. The reduction in rates ordered by the Commission was brought about in large part by the reduction in the rate of return from 6% to 5½%, as shown by Record page 42.

We believe that a better statement and understanding of the actions of the courts below are shown by the decisions of those courts (R. 262-264, 641-656) than the statement of Petitioner on pages 4 to 7 of its petition.

SUMMARY OF ARGUMENT

1. Paragraph 18 of the act permits a sliding-scale plan for rate-making that the Commission finds to be reasonable and just and not inconsistent with the purposes of the act. Any such plan is "under the supervision and regulation" of the Commission with "the right to alter or amend all orders relative thereto." The standard for rate-making is that rates be reasonable, just, and non-discriminatory. Such a standard preserves all the ordinary rules of rate-making and safeguards all rights of the utility. The Petitioner had notice and full opportunity to be heard on all points. It participated in the investigation and after the Commission's order was promulgated announced for the first time it rejected the modified plan.

Two Judges below held that the Commission had authority, under paragraph 18, to modify the plan without the Petitioner's consent to the modifiations. One Judge decided that the plan could be modified only by mutual agreement. The Commission first modified the plan in 1931 and the District Court upheld its right so to do. Two other modifiations of the plan have been made. The Petitioner did not complain below and does not complain here of the valuation fixed by the Commission nor of the rate of return allowed.

2. The investigation instituted by the Commission was not a proceeding under paragraph 6. That paragraph does not lay down a valuation formula nor establish a method of rate-making. The paragraph uses no word connoting valuation or rate-making. The "information" required by paragraph 6 is not the "components of fair value" and is not required in rate-making but is to be printed in annual reports to Congress. The principal elements of fair value under the Smyth v. Ames doctrine are not

required to be ascertained under the provisions of paragraph 6. Congress indicated a recognition that paragraph 6 did not establish a valuation formula.

The majority of the court below were clear in their separate decisions that paragraph 6 is not a rate-making formula and that the act does not require value to be predicated upon reproduction estimates. Local interpretation of a local statute will not confuse state courts in their interpretations of state statutes.

3. The decisions of the majority in the court below are not in conflict with other decisions of that court nor applicable decisions of this Court. Two Judges agreed that the Commission has authority, under paragraph 18 of the act, to alter or amend the sliding-scale. Their decision is in accord with a statement of this Court. Both agreed that paragraph 6 of the act does not establish a legislative formula and that the Commission was not required to establish a rate base predicated upon reproduction estimates. The questions raised by the Petitioner are not those indicated by this Court as grounds for issuing a writ of certiorari.

ARGUMENT

1. Paragraph 18 of the Act Authorizes the Commission to Alter or Amend Orders Authorized by the Paragraph.

In its argument, the Petitioner (page 9) states there was no reason why the Congress should give the Commission unlimited privilege for rate-making without satisfaction of the ordinary rules. Congress has not given the Commission an unlimited privilege in rate-making. Paragraph 18 provides that no arrangement authorized by it shall be lawfull until it shall be found by the Commission, after investigation, "to be reasonable and just and not inconsistent with the purposes" of the act. That is not an unlimited privilege. Paragraph 2 of the act establishes the standard that rates shall be reasonable, just, and non-discriminatory. To the extent that rates

may be established under the authority of paragraph 18, the Commission is limited by the standard set up in paragraph 2.

But the Petitioner does not advise the Court of any ordinary rules in rate-making that were not followed by the Commission in its investigation.

The Petitioner says no public utility management could be expected to make any compromise arrangement under paragraph 18 if by so doing it would surrender all safeguards of regular rate-making practice. The Petitioner has failed to point to a single safeguard that it did not have throughout the proceeding before the Commission. It had notice; it had opportunity to be heard; and was heard, fully, in cross-examination of witnesses, in the presentation of evidence through its own witness, and in argument by way of a written brief. In making its findings and in issuing its order, the Commission gave consideration to all of the ordinary rules of rate-making and afforded the Petitioner every safeguard to which it is entitled under the statute or under constitutional right. The Commission found the fair value as of December 31, 1943, and the fair rate of return the Petitioner is entitled to earn on the value of its property. The Petitioner did not complain in the court below, and is not complaining here, of a lack of fair return upon its investment for public service. It has had all the safeguards that the law requires.

The Petitioner says that the Commission's powers must be exercised in the future in uncertainty if the decision below is to remain in effect. The Commission has no uncertainty as to its powers because of the decision below. Judge Edgerton had no uncertainty in his mind that the Commission has authority to modify the sliding-scale plan when he said that paragraph 18, "expressly vests in the Commission full authority to change rates and regulations which have been embodied in a mutual agreement regarding a sliding-scale," and when he said that the plain language of paragraph 18 answers the Petitioner's argument. (R. 645.) There was no uncertainty in the mind of Judge Clark when he said that the Pe-

titioner's construction of paragraph 18 is "clearly against the obvious intent of Congress in passing this provision." (R. 647.) There was no uncertainty in the mind of Judge Miller when he dissented from the decision of the majority and said that paragraph 18 authorized an agreement, "which is entered into voluntarily by the utility." (R. 650.) There cannot be much uncertainty in the mind of the Petitioner about what the majority held because it seeks to have that decision reversed.

On page 9 of its argument the Petitioner says that here for the first time, the Commission asserted a special power of exemption from rate-making routine. This statement is contrary to fact. First, the Commission has claimed no exemption from rate-making routine. Its Findings and Opinion and Order show a consideration of and determination of every element required to establish just and reasonable rates. If the inference intended to be drawn from this statement is that the Commission for the first time asserted a right to modify the sliding-scale plan, that is also contrary to fact. In 1931 the Commission modified the then existing sliding-scale plan by reducing the basic rate of return from 7½% to 7%. The Petitioner appealed from that decision in *Potomac Electric Power Co.* v. *Public Utilities Commission*, Equity No. 53475 (Supreme Court of the District of Columbia, now the District Court of the United States for the District of Columbia) on the identical ground that it asks this Court to review and reverse the court below. In that case, the court said the Commission had jurisdiction "to alter or amend the existing sliding-scale arrangement." Notice of appeal to the Court of Appeals for the District of Columbia was noted but was not prosecuted. The Commission again modified the sliding-scale plan so as to further reduce the rate of return in 1935 and 1937.

The District Court has on two occasions, once in 1931 in Equity No. 53475 and again in the instant case, held that the Commission has authority under the provisions of paragraph

18 to alter or amend the sliding-scale plan. The Court of Appeals of the District of Columbia so held by its majority decision in the case below. While the specific question was not in issue, this Court, in *Vinson v. Washington Gas Light Company*, 321 U. S. 489, at 492, said that an arrangement adopted under the provisions of paragraph 18 "must operate under the supervision and regulation of the Commission, may be altered and amended, and may be terminated by the Commission."

The Petitioner states that the Commission had, prior to this proceeding, uniformly recognized that any sliding-scale arrangement might be terminated on reasonable notice by either party. The sliding-scale plan for the determination of electric rates does not contain any such provision. The plan referred to by the Petitioner is that for the determination of gas rates and that plan specifically provides that either party may give notice in writing of at least 90 days of its intention to withdraw from the plan. But the Petitioner did not give the Commission notice in the instant proceeding at any time of its intention to withdraw from the sliding-scale plan until it had awaited, hopefully, for the result of the Commission's findings.

The Petitioner argues that the difference in the opinions of Judges Edgerton and Miller and the indecision of Judge Clark, left the law indeterminable. In the majority decisions below the court said the Commission has authority under the specific language of paragraph 18 to alter or amend any orders authorized by the paragraph. Judge Miller took a different view. Certainly there was no indecision in the opinion of Judge Clark when he said the Petitioner's argument was clearly against the obvious intention of Congress in passing the provisions. (R. 647.) There was no indecision in the opinion of Judge Edgerton when he said the plain language of paragraph 18 answers the Petitioner's argument. (R. 645.) There is no indecision in the opinion of Judge Miller when

he said that a sliding-scale arrangement permitted by paragraph 18 must be entered into voluntarily by the utility. There was no indecision in the findings of Judges Edgerton and Clark that the judgment of the lower court should be affirmed in dismissing the Petitioner's appeal.

Confusion, if there be any, compounded by the confusion of Petitioner, does not state a ground for granting a writ of certiorari.

2. Paragraph 6 of the Act Does Not Establish a Formula for Determining a Rate Base.

The Petitioner's second question and its argument is premised upon the assumption that the proceeding before the Commission was a valuation proceeding and that paragraph 6 of the act (37 Stat. 978, Sec. 43-305, D. C. Code) lays down a formula for valuation. This was not a valuation proceeding to find value for the sake of valuation. It was an investigation of the sliding-scale arrangement consolidated with the annual rate investigation under that plan. (R. 1, 2.) Value was involved because the rate base is one of the principal elements of the plan.

This was not a proceeding instituted under the provisions of paragraph 6 of the act. The dissenting Judge found the investigation was proper procedure under paragraph 18 of the act. (R. 653.)

But paragraph 6 is not a valuation formula and does not set out a method for rate-making. In establishing the Commission, Congress seemed concerned that the Commission should be informed about the utilities to be regulated and that Congress have such information for any appropriate legislative purpose. The only use prescribed of the "information" to be found was to print it in the annual reports.

On page 11 of the petition, it is asserted that paragraph 6 of the act lists the "main components" of value, "principally original cost and current cost of reproduction." Paragraph 6 of the act does not contain the words "fair value," "value,"

or "rate base," as indicated by Judge Edgerton in footnote 11 on Record page 646 and as stated by Judge Clark on Record page 649. Nor does the paragraph indicate that information required to be found by the Commission is in accordance with the so-called elements of fair value particularized in *Smyth* v. *Ames*, 169 U. S. 466.

Judge Edgerton said there is nothing in paragraph 6 or elsewhere in the act to indicate that the matter set forth in paragraph 6 must be adopted as a rate base. (R. 646.) Judge Clark said the paragraph does not indicate that the information collected under it shall be employed for the purpose of setting rates. (R. 649.)

Not only does the Petitioner state that paragraph 6 lists the main components of fair value, but that the principal elements are original cost and current cost of reproduction. There is nothing in paragraph 6 or elsewhere in the act to give credence to any such assertion. Paragraph 6 enumerates a great many things that the Commission was required to ascertain. Rather than saying that the matters to be found are the principal components, or even components of value, Congress said whenever the "information" required by the paragraph is obtained it shall be printed in the Commission's annual report.

Among other things, paragraph 6 requires the Commission to determine outstanding stock, bonds, debentures, and indebtedness, and the amount, respectively thereof, the date when issued, to whom issued, to whom sold, and the price paid in cash, property, or labor, to find the disposition of proceeds, by whom the indebtedness was held and the amount due thereon, the floating indebtedness of the utility, credits due the utility, other property belonging to the utility, judicial or other sales of a public utility, its property or franchises, and the amounts and manner paid therefor, and taxes paid thereon, the gross and net income of every utility from all sources, the amounts paid for salaries to officers and wages paid to employees and the maximum hours of continuous service re-

quired of each class. This information does not sound like the elements of fair value, catalogued in *Smyth* v. *Ames*, *supra*. In that case, the court said that some of the things to be considered in determining value are (1) the amount expended in permanent improvements, (2) the market value of the company's bonds and stocks, (3) earning capacity of the property under particular rates prescribed by statute, and, (4) the sum required to meet operating expenses. None of these prime components in the *Smyth* v. *Ames* doctrine is required to be determined in paragraph 6.

The Petitioner says on page 11 of its petition that paragraph 6 crystallized in a legislative formula the pronouncements in *Smyth* v. *Ames*. If so, it is difficult to understand why Congress did not crystallize the four items hereinabove enumerated which the court thought were of such importance in determining fair value. If paragraph 6 lays down a formula, did Congress intend to strike down these elements of value?

The answer is that Congress did not establish, and did not intend to establish, in paragraph 6 a rate formula or even a guide in the determination of rates. This may be illustrated by the report made by the Board of Commissioners of the District of Columbia shown in Senate Report No. 300, 62nd Congress, Second Session referred to by the Petitioner on page 12 of the petition. The significant fact about that report is that it was a report on S. 3812, 62nd Congress, Second Session, which bill, at the time the report was made, contained in section 6 thereof a provision to "ascertain the fair value" of each utility. But in paragraph 6 of the act approved by Congress, that language was deleted. If this has any significance, it is that Congress purposely deleted those words from paragraph 6.

Accrued depreciation and annual charges for depreciation are among the most important elements in valuation and rate-making, and are of particular importance in the fair value doctrine of *Smyth* v. *Ames*. But paragraph 6 is absolutely silent on the question of depreciation. The rate of return

is also an important element in rate-making and if paragraph 6 crystallized in a legislative formula the fair value theory, it is difficult to understand why the formula did not include the element of accrued depreciation and the matter of a fair rate of return.

Paragraph 7 of the act (Sec. 43-306, D. C. Code, 37 Stat. 978) is a valuation provision. It provides that the Commission shall value used and useful property at the fair value thereof at the time of said valuation. Paragraph 8 sets out the procedure for valuation. The provisions are that the utility shall have notice of at least 30 days and a public hearing. Paragraph 6 does not provide for notice or public hearing to ascertain the "information" to be printed in the Commission's annual report.

There is a stronger indication in the first paragraph of paragraph 64 of the act (App. Page 1) that Congress did not establish a formula and did not intend to establish a formula for rate-making. There Congress provided that if at any time the Commission shall be in doubt of the elements of value to be considered in "arriving at the true valuation" under the act it is authorized to institute a proceeding in court, petitioning the court to instruct the Commission as to the element or elements of value to be considered. (App. 1.) If paragraph 6 laid down the main components of fair value, and if original cost and cost of reproduction are the principal elements, then there is no reason why the Commission should go to the court for instructions as to the element or elements to be considered. If paragraph 6 established a legislative formula, the court was without authority to instruct the Commission to disregard that formula.

The first paragraph of paragraph 64 of the act provides that in a proceeding for instructions as to the element or elements of value to be considered the particular utility under valuation at the time shall be made a party defendant in the said action. Paragraph 6 does not provide that a utility must be made a party to any proceeding under it. It requires neither

notice nor hearing. The enactment of these provisions of paragraph 64 is a clear indication that Congress itself recognized it had not established a formula for rate-making and had not listed in paragraph 6 the principal components of fair value. Paragraph 64 indicates that the elements to be considered in valuation shall result in a "true valuation." Even assuming that a cost of reproduction estimate is evidence of value, it is that and nothing more.

A reproduction estimate is not an end sought, but merely one means of attempting to find value. Since the ultimate is the determination of the value, if there is better evidence than reproduction estimates, it should be used. In the instant proceeding, the Commission had the actual cost of the property, which was unchallenged. Having the best evidence, there was no occasion to revert to secondary evidence of a speculative and conjectural character. Fair value so found meets the requirements of paragraph 7 of the act and all constitutional requirements.

The cases cited by Petitioner in footnotes 10 and 11 on pages 12 and 13 of its petition do not support the argument that the Court of Appeals of the District of Columbia, nor this Court, has decided that the act requires a finding of current cost of reproduction. In the cases cited in footnotes 10 and 11, the Commission considered reproduction cost as an element of value. In *Potomac Electric Power Co.* v. *Public Utilities Commission,* 51 App. D. C. 77, 276 Fed. 327, and *Public Utilities Commission* v. *Capital Traction Company,* 57 App. D. C. 85, 17 F. (2d) 673, the construction of paragraph 6 was not involved. In both cases the Commission had considered reproduction cost, but instead of considering the reproduction cost as of the date of the valuation, it had, in each instance, used such cost as of July 1, 1914. In these cases the Court of Appeals said the determination of cost as of 1914 did not meet the requirement to give weight to the then value of the property. The Chief Justice dissented in the *Potomac Power Company case.* Neither of those cases held

as a matter of law that reproduction cost estimate was a measure of value because that question was not before the court in either case.

The Petitioner argues that the majority decision below results in a misapplication of the decisions of this Court in *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591, and *Federal Power Commission* v. *Natural Gas Pipe Line Co.*, 315 U. S. 575, and thereby thwarts the statutory requirement of paragraph 6 of the act. In both of those cases this Court was construing the Natural Gas Act (52 Stat. 821, 15 U. S. C. 717). Section 6(a) of that act provides that the Federal Power Commission may investigate and ascertain the actual legitimate cost of property, the depreciation therein and, when found necessary for "rate-making purposes," other facts which bear on the determination of such cost or depreciation and "the fair value of such property." Here is a section which clearly indicates that valuation and rate-making were involved. In the *Hope case*, at page 600, this Court said that in spite of the language there used, Congress had provided no formula by which the just and reasonable rate is to be determined. This view is clearly indicated by the decisions of this Court in those two cases in which two entirely different methods were used in determining the rate base, one on a reproduction cost basis and the other on original cost.

The Petitioner undertakes to show some possible ground for issuing a writ of certiorari by asserting that the decision of the Court of Appeals is in conflict with applicable decisions of this Court and is particularly serious because it sets aside a legislative purpose and undermines the administrative process. We believe the decision of the majority below is not in conflict with applicable decisions of this Court. From what has been said hereinabove, we believe it is clear that Congress has not laid down a legislative formula for rate-making and that the legislative purpose has not been thwarted.

The Petitioner also seeks to show a possible ground for issuing the writ by asserting that the decisions of the majority

in the court below may well lead to confusion and delay because several state statutes require valuation based upon reproduction cost estimates. There is not in the majority opinion below the confusion the Petitioner would lead this Court to believe. On both questions raised by the Petitioner, the majority were in agreement and, if in different language, answered the questions against the contention of the Petitioner. Both Judges Edgerton (R. 645) and Clark (R. 647) agreed that paragraph 18 gives the Commission power to alter or amend the sliding-scale plan. Both agreed (R. 646, Note 11, and R. 649) that paragraph 6 of the act does not require the Commission to predicate its finding of the rate base upon reproduction estimates. Both agreed that Petitioner had no cause to complain and that the decision of the District Court should be affirmed.

The decision of the Court of Appeals interpreted a statute of only local interest and application. The act involved applies to no other jurisdiction than the District of Columbia. Paragraph 7 of the act requires the Commission to value the property used and useful for the convenience of the public "at the fair value thereof at the time of said valuation." That was done. The Commission found the value as of December 31, 1943 (R. 21, 42). Judge Clark so found. (R. 650.) The construction of a local statute can hardly lead to confusion and delay in the application of state statutes.

Question 2 is not of such character and of such importance as to justify review.

3. The Questions Presented are not Such as to Justify Review.

The questions presented on page 2 of the petition briefly stated are: 1. Does paragraph 18 authorize the Commission to alter or modify the sliding-scale plan without the consent of the Petitioner? 2. Does paragraph 6 of the act require the Commission to fix a rate base predicated in major part upon reproduction cost estimates?

While the language of the questions is far different from that stated hereinabove, they are in essence and without confusion here simply stated.

The decisions of the majority in the court below are not in conflict with other decisions of that court nor applicable decisions of this Court. Both Judges Edgerton and Clark agreed that the Commission has authority under paragraph 18 of the act to alter or amend the sliding-scale plan. That decision is not in conflict with any other decision interpreting the statute. It is in accord with what this Court said in *Vinson* v. *Washington Gas Light Co., supra.* Both agreed that paragraph 6 does not establish a legislative formula and that the Commission had authority to determine the rate base without consideration of reproduction estimates. Both agreed, as the Petitioner admits on page 7 of its petition, that matters of procedure short of confiscation, were unimportant. (R. 645, 650.) Both agreed that the Petitioner was not harmed by the Commission's order.

These decisions are not such as justify a review on certiorari. The questions presented by the Petitioner are not those stated by this Court in sub-paragraph 5 of Rule 38 as indicative of reasons for review. They do not raise questions of such importance as to justify the issuance of a writ of certiorari.

CONCLUSION

It is respectfully submitted that the Petition for Writ of Certiorari should be denied.

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APPENDIX

The first paragraph of paragraph 64 of the act creating the Public Utilities Commission (Sec. 43-704, D. C. Code, 1940 Ed.; 37 Stat. 988) reads as follows:

> "Par. 64. That if at any time the commission shall be in doubt of the elements of value to be by them considered in arriving at the true valuation under the provisions of this section, they are authorized and empowered to institute a proceeding in equity in the District Court of the United States for the District of Columbia, petitioning said court to instruct them as to the element or elements of value to be by them considered as aforesaid, and the particular utility under valuation at the time shall be made party defendant in said action."